No. 12862.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARWOOD A. WHITE,

Appellant,

vs.

SUSAN C. KIMMELL and E. T. DUTTON AND COMPANY, INC., a corporation,

Appellees.

APPELLANT'S REBUTTAL BRIEF.

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I.

Appellee's Reply Brief Is Based Upon an Assumption of Fact Not Sustained by the Evidence.

Appellee, Susan C. Kimmell, repeatedly through her brief, assumes that Stewart Edward White had the "Gaelic" manuscript reproduced and passed it around to a few of his friends. Were this the case appellee's argument would have more validity. The wording of appellee's brief is somewhat evasive, she says that Stewart Edward White, Margaret Oettinger, Ivy Duce, appellant and others circulated and distributed the manuscript to friends and acquaintances. Nowhere is it specified to *whose* friends and acquaintances distribution was made. It would be difficult to find an individual so unattractive, so reclusive or so inconspicuous that he would be no one's friend or acquaintance. Many friends of Stewart Edward White were

supplied with copies of "Gaelic", so were friends of Mrs. Oettinger, appellee, appellant, Mrs. Duce, and so were friends of their friends, and very significantly, so were strangers who communicated with Stewart Edward White or Mrs. Oettinger and were either given a copy or supplied one at $2.00 or $1.50 per copy. We quote appellee's own testimony on the subject:

> "Q. (By Mr. Mullen): You don't know the persons to whom the copies of 'Gaelic' were sent in that period, who read it or exchanged it in that seven-year period? A. I know some of them, and Mr. White told me about some of those people that received them.
>
> Q. You don't purport, however, to represent, by any sense of the word, you knew all the people to whom it was handed, or what their background or connection was, if any, with Stewart Edward White? A. No.
>
> Q. You have no personal knowledge, do you, Mrs. Kimmell, as to what the cost of the making of copies was by Mrs. Oettinger? A. No.
>
> Q. You don't know that they cost her $2.00 flat and even, do you? A. I don't know that they cost her $2.00. I know about Mrs. Duce, who made the same copies.
>
> Q. I am referring to Mrs. Oettinger. A. No, I don't. I had no correspondence with her about it.
>
> Q. When you stated that these friends of yours, to whom you gave Mrs. Oettinger's name, that sent Mrs. Oettinger $2.00 for the copies, that was the cost, that is your judgment as to what— A. That is my judgment, based on the fact that Stewart Edward White, in his letter submitted as evidence, said she was to charge only the cost of reproduction. That would be a fair assumption then.

Q. You are not personally familiar with whether they cost her a dollar or a dollar and a half, or what? A. No.

Q. You do know that copies were sold at $2.00? A. $2.00 was paid for them."

Patently the manuscript was sold, given and circulated far beyond the circle of Stewart Edward White's friends and acquaintances for a period of many years.

II.

Application of the Law to the Facts of This Case.

1. Appellee's Conclusions as to the Law Are Entirely Too Broad.

Appellee draws from the cases cited much broader conclusions than they justify.

Appellee cites *Werkmeister v. American Lithographic Company,* 207 U. S. 284 at 299, for the following proposition as appellee states it on page 10 of her brief:

> "To constitute general publication the work must be made available in some manner and in some place to the general public without discrimination as to persons, so that any member thereof who chooses may have access thereto. There must be no restrictions of any kind imposed by the author. . . ."

The Supreme Court, in the *Werkmeister* case, sums up the law as follows:

> "The result of an examination of the authorities seems to show that the following propositions are established: a general publication consists in such a disclosure, communication, circulation, exhibition or

distribution of the subject of copyright, tendered or given, to one or more members of the general public, as implies an abandonment of the right of copyright or its dedication to the public. Prior to such publication, a person entitled to copyright may restrict the use or enjoyment of such subject to definitely selected individuals or a limited, ascertained class or he may expressly or by implication confine the enjoyment of such subject matter to some occasion or definite purpose. . . ."

Appellee further says on page 10, the following:

"If any sort of express or implied restrictions are imposed, the result is a limited publication, and the author does not lose his property in the subject of such limited publication."

The foregoing does not conform to the law. Any sort of restriction will not prevent a publication. The restriction must be a limitation to a definite class or to selected individuals.

Again in the *Werkmeister* case the court says:

". . . The nature of the subject matter, the character of the communication, circulation or exhibition and the nature of the rights secured are chiefly determinative of the question of publication."

2. **The Intent With Which a Publication Is Made Is a Material Circumstance to Be Considered but Is Not Controlling.**

Berry v. Hoffman, 189 Atl. 516 (Pa.);
Waring v. WDAS, 194 Atl. 631.

To these matters the fundamental legal principle is applied, that the author's acts are measured by what he intended to do, not by what he intended by what he did.

Kurfiss v. Cowherd, 121 S. W. 2d 282;
18 C. J. S., pp. 151-152, par. 13-2.

Actually, the acts of the author in this case show a clear intent to donate the work to a segment of the general public. For a period of about twenty-five (25) years he circulated the document among members of the general public sufficiently interested to read it or ask for it; he had the document made up in mimeograph book form, and sent copies to many people with instructions to circulate it among their friends and acquaintances; he maintained his own circulating library of copies which he loaned freely to anyone desiring to read it: Mrs. Oettinger, a stranger to the author, was given a copy by someone who had received it from Stewart Edward White, she requested of Stewart Edward White the right to reproduce the manuscript and sell it at cost to a group of her friends and friends of her friends. Stewart Edward White, by his own statement, consented to an indefinite group of people in Palo Alto reproducing the document and selling it at cost among their friends; he himself referred people to Mrs. Oettinger for copies, at $2.00 each, indiscriminately,

both friends and strangers. Patently it appears that Stewart Edward White considered the work a kind of a collection of basic philosophical ideas communicated to him by "Gaelic" and felt that the reading of it would be beneficial to people at large and went to considerable expense and trouble to make it available. Nowhere does it appear that Stewart Edward White had any other motive than publication in circulating the manuscript. Even appellee concedes that the only limitation on the circulation was to those "particularly interested in the subject matter." No other criterion for selection of readers is even suggested.

3. The Cases Holding Publications to Have Been Limited or Private Are Those Where the Author Uses His Own Work for His Own Private or Professional Purposes.

(a) A preacher's sermon notes published to his own parishioners.

Dr. Pellcy's case, 2 Ves. & B. 23.

(b) A teacher's lecture notes and instruction to his pupils.

Bartlett v. Crittenden, 4 McLean 300;

Waring v. WDAS, 194 Atl. 631.

(c) A doctor's instructions to his patients.

Schellberg v. Empringham, 36 F. 2d 991 (D. C. N. Y.).

(d) A private exhibition of a picture or statue with reservations against copying which are enforced.

American Tobacco Co. v. Werkmeister, 207 U. S. 284, 52 L. Ed. 208;

Carns v. Keefe, 242 Fed. 745.

(e) Performance by the author of a musical composition does not constitute publication.

Waring v. WDAS, 194 Atl. 631 (Pa.).

However, printing and distributing a musical composition or dramatic work does constitute publication.

Savage v. Hoffman, 159 Fed. 584;

Wagner v. Conreid, 125 Fed. 798;

Daly v. Walrath, 57 N. Y. Supp. 1125.

4. The Effect of the Author's Acts in This Case Is to Dedicate the Manuscript to the General Public and Release It for Use by Anyone.

Moore v. Ford Motor Co., 43 F. 2d 685;

Hurwitz v. Meyer, 10 F. 2d 370;

Van Veen v. Franklin Knitting Mills, 260 N. Y. Supp. 163;

Gilmore v. Sammors, 269 S. W. 861 (Tex.);

Affiliated Enterprises v. Gruber, 86 F. 2d 958;

Bobbs-Merrill Co. v. Straws, 210 U. S. 339, 52 L. Ed. 1086.

This is true whether or not the author intended to release his exclusive rights.

Kurfiss v. Cowherd, 1215 S. W. 2d 282 (Mo.);

Van Veen v. Franklin Knitting Mills, 260 N. Y. Supp. 163;

Waring v. WDAS, 194 Atl. 631 (Pa.).

III.

The Court May Not, as Was Done Here, Disregard Credible, Unimpeached Testimony of Witnesses Who Know the Facts and Arbitrarily Make a Decision Contrary Thereto.

Twentieth Century-Fox v. Deickhaus, 153 F. 2d 893.

IV.

Conclusion.

The court here rendered a decision which disregards the testimony of several credible witnesses familiar with the acts and whose testimony was unimpeached. As a matter of fact, the decision runs contrary to the manifest intent and declarations of the author himself. The court seizes upon testimony of three persons who were unfamiliar with the facts and whose testimony does not purport to cover or relate to the contended publication of the manuscript in question by the author and Mrs. Oettinger, with his consent. The findings drawn in the light of the evidence are equivocal and insufficient and reflect the state of the record. The cause should therefore be reversed with directions to make findings in favor of appellant and to enter judgment thereon.

Dated: June 28, 1951.

Respectfully submitted,

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